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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

LAWRENCE RICHARD GARCIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the due process clause of the Fourteenth Amendment to the United States Constitution is violated when a trial court omits to instruct on the intent required for the finding of a special circumstance (a finding under California law which requires imposition of the penalty of death or life without possibility of parole) when the special circumstance does not define a criminal offense but is, rather, a component of the sentencing process.

2. Whether such error, assuming it is of federal constitutional dimension, may be deemed harmless under the test of Chapman v. California (1967) 386 U.S. 18.

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IN THE
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October Term, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

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v.

LAWRENCE RICHARD GARCIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of California reversing the judgment entered on December 23, 1980. A petition for rehearing filed by the defendant was denied on October 29, 1984. The remittitur was issued on October 30, 1984.

OPINIONS BELOW

The opinion of the California Supreme Court reversing the judgment below (People v. Garcia (1984) 36 Cal.3d 539) appears as Appendix A of this Petition. A copy of the California Supreme Court's order denying the petition for rehearing without opinion appears as Exhibit B.

JURISDICTION

The judgment of the California Supreme Court was filed on August 6, 1984. A timely petition for rehearing filed by the respondent was denied on October 29, 1984. This petition is filed within 60 days of that date and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Fourteen. California Penal Code sections 190, 190.2, 190.25, 190.3, 190.4.

STATEMENT OF THE CASE

On September 8, 1979 the District Attorney of Ventura County filed an information in which respondent was charged in Count I with violating California Penal Code sections 664/211 (attempted robbery) and in Count II with violating California Penal Code section 187 (murder). This information was amended on March 19, 1980 to allege

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special circumstances. (Cal. Pen. Code, § 190.2, subd. (a)(17)(i).) (CT 1.)[1/]

On September 18, 1979 respondent was arraigned. (CT 2.)

Trial by jury commenced on March 19, 1980. It culminated on April 23, 1980 with respondent being found guilty of attempted robbery and murder. The charged special circumstances were found to be true. (CT 38-68, 157, 161.)

On June 18, 1980 probation was denied. On December 23, 1980 respondent's motion for new trial was denied. (CT 180.) Respondent was sentenced to state prison for life without the

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1. The designation CT refers to the clerk's transcript on appeal. The designation RT refers to the reporter's transcript on appeal. IRT(a) and IRT(b) refers to transcripts of the first (a) and second (b) interviews with the police. RT(a) refers to the reporter's transcript of the hearing on the voluntariness of the confession.

possibility of parole on Count II with a term of three years imposed on Count I to be served concurrently. (CT 187.)

On July 21, 1982 the judgment was affirmed by the California Court of Appeal. On August 6, 1984 the California Supreme Court affirmed the judgment convicting defendant of murder and attempted robbery, but the finding of special circumstances under Penal Code section 190.2, subdivision (a)(17) was set aside and the cause was remanded to the Superior Court for further proceedings.

STATEMENT OF FACTS

A. The Crime

At about 8:00 p.m. of August 10, 1979, a 1964 Impala owned by respondent, was driven into a shopping center at Pleasant Valley and Saviers Road in Oxnard. A man got out of the car and entered the liquor store, while the car

was driven out of the parking lot and was parked in an alley. (RT 6-7, 10, 29-30, 35-36.)

A man approached a clerk, Al Wieczorek, and shot him. The gunman fled the store, got into respondent's car and the driver took off. Mr. Wieczorek died of a gunshot wound to the chest caused by a dum-dum bullet which is more lethal than a normal bullet. (RT 57, 68-69, 85, 91, 197, 201, 205.)

A few days later, respondent and another person were arrested while sitting in respondent's car. The murder weapon was found under a pillow on which appellant was sitting. (RT 129, 131, 229.)

B. The Confession

After respondent waived his rights, he talked to Detectives Chatwin and Skeeters and denied being in town

the night of October 10. (IRT(a) 1-3.) However, as the interview ended, respondent told the officers to talk to him after they talked to Orlando. (IRT(a) 18.)

During the second interview, respondent told the police Orlando wanted to get out of town because of pressure from Nuestra Familia so respondent drove Orlando to the liquor store to commit the robbery. Orlando took a gun (respondent knew it was loaded with dum-dum bullets). Then respondent parked in the alley so he could not be identified. When Orlando returned, he told respondent he had shot the clerk. (IRT(b) 3-5, 7, 9-10, 12.)

HOW THE FEDERAL QUESTION IS PRESENTED

In Carlos v. Superior Court (1983) 35 Cal.3d 131, the California

Supreme Court held that proof of intent to kill or to aid a killing was essential to a finding of a felony murder special circumstance under California's 1978 death penalty initiative. (Cal. Pen. Code, § 190.2, subd. (a)(17).) The present case was decided by the California Supreme Court to determine the retroactivity of Carlos and to define the test of prejudice applicable when a trial court fails to instruct the jury in accordance with the Carlos decision.

After review of these issues the California Supreme Court determined Carlos retroactive and held the question of prejudice in the context of a special circumstance was controlled by the United States Constitution and opinions of this Court interpreting the United States Constitution. (See People v. Garcia, supra, 36 Cal.3d 550-558; Appen. A, pp. 11-21.)

REASONS FOR GRANTING THE WRIT

The California Supreme Court erred when it determined the omission of an instruction on the intent required for a finding of special circumstances denied the defendant due process under the Fourteenth Amendment of the United States Constitution and required, essentially per se reversal of the special circumstance finding.

The California Supreme Court erred when it applied to the special circumstance determination considerations this Court has applied only to the finding of criminal offenses even though the California Supreme Court had determined that a special circumstance does not define a criminal offense.

It is important the issue of the application of the due process clause of the Fourteenth Amendment to

such special circumstance determinations be resolved by this Court.

ARGUMENT

I

THE FAILURE TO INSTRUCT THAT INTENT IS A NECESSARY ELEMENT OF A SPECIAL CIRCUMSTANCE FINDING IS NOT AN ERROR OF FEDERAL CONSTITUTIONAL DIMENSION

The California Supreme Court erred in holding it is Federal Constitutional error when a trial court fails to instruct in a capital case that an intent to kill is an element necessary for a finding of special circumstances, i.e., those factors beyond the finding of first degree murder necessary for the imposition of the sentence of life without possibility of parole or death.

The United States Supreme Court authorities on which the California holding is ostensibly based do not support the conclusion. This

Court has held that federal due process requires the elements of a criminal offense be found beyond a reasonable doubt, and the burden of proof concerning such elements not be shifted to the defense nor be established by presumption.

The California Supreme Court, however, has applied this rule concerning crimes to special circumstances which, as the California Supreme Court itself notes, are not criminal offenses. Further, the California Supreme Court applies its rule to the omission of an instruction on an element unlike the cases of this Court which developed the rule in the context of presumptions, employed to establish elements of criminal offenses. (See People v. Garcia, supra, 36 Cal.3d at pp. 550-558; Appen. A, pp. 11-21.) Thus, application

of federal due process concepts to the instructional error in the present case was erroneous.

To fully understand the California court's error it is necessary to briefly review California's death penalty law and then this Court's cases concerning the Constitutional necessity that the elements of offenses be found beyond a reasonable doubt.

California has a tripartite system for the trial of cases in which the punishment of death is sought. First, a jury, or a judge, if jury is waived, must decide if the defendant is guilty of murder in the first degree. Next, if murder in the first degree is found then the jury or a judge (if jury is waived) must return a special verdict on the charged special circumstance. The California Penal Code enumerates

the special circumstances; each a factor or set of factors that the People of California have determined so aggravate the crime of first degree murder that a punishment of death or life imprisonment without possibility of parole is appropriate. Finally, if one or more special circumstances are found the jury, or a judge (if jury is waived) determines whether the aggravating factors surrounding the crime or the criminal outweigh any factors in mitigation. If it is so found then, subject to review by the trial court, the punishment is set at death; if not, then the punishment is life without possibility of parole. (Cal. Pen Code, §§ 190, 190.2, 190.25, 190.3, 190.4.)

In an earlier case the California Supreme Court held proof of intent to kill or to aid a killing was

essential to a finding of a special circumstance based on felony murder. (Cal. Pen. Code, § 190.2, subd. (a)(17); Carlos v. Superior Court (1983) 35 Cal.3d 131.) The issue of the standard of harmless error applicable when there is a failure to instruct on this intent element was the subject of the present case.

The California Supreme Court concluded the question of harmless error was controlled by a line of decisions from this Court beginning with In re Winship (1973) 397 U.S. 358, continuing through Sandstrom v. Montana (1979) 442 U.S. 510, and Connecticut v. Johnson (Feb. 23, 1983) ___ U.S. ___, 103 S.Ct. 969. In reviewing this line of cases, the California Supreme Court paid particular attention to this Court's opinion in Sandstrom. The California

Supreme Court noted that Sandstrom quotes Winship to the effect that

> "the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (Sandstrom v. Montana, supra, 442 U.S. at p. 520.)

Extrapolating from this concept the California Supreme Court held it was a denial of federal due process not to instruct concerning the intent element involved in a charged special circumstance.

The obvious difficulty with this reasoning, and indeed, one recognized by the California Supreme Court, is that without exception the opinions of this Court dealing with the denial of due process based on the failure to require that an element be found beyond

a reasonable doubt deal with criminal offenses.

The California Supreme Court states that special circumstances are sui generis. The court makes the point a special circumstance is neither a crime, an enhancement, nor a sentencing factor. The California Supreme Court notes that in earlier cases it had discussed the resemblance between the special circumstance proceeding and a trial to determine guilt. The court noted the interests which turned on the finding of a special circumstance were extremely important. The court noted that a special circumstance was not simply an aggravating factor. It was a factor which must be found beyond a reasonable doubt by a unanimous verdict (Cal. Pen. Code, § 190.4), which changes the crime from one punishable by

imprisonment of 25 years to life, to one which must be punished either by death or life imprisonment without the possibility of parole. The court concluded in view of the importance of the special circumstance finding it could not extend to defendants less protection with regard to the elements of a special circumstance than the protection extended with regard to the elements of a criminal charge.

While all the above may be true, with its next step, the California Supreme Court erred. The court concluded that if the failure to instruct on the element of a crime is a denial of federal due process, the same was true concerning the failure to instruct on the elements of a special circumstance. The California Supreme Court provides no authority whatsoever for this conclusion. Indeed, a review of the opinions

of this Court cited by the California Supreme Court all emphasize that it is the determination of guilt that is the crucial matter to which federal due process applies. (In re Winship, supra, 397 U.S. 358; Sandstrom v. Montana, supra, 442 U.S. 510; Patterson v. New York (1977) 432 U.S. 197; Mullaney v. Wilbur (1975) 421 U.S. 684; Connecticut v. Johnson, supra, 103 S.Ct. 969.)

Perhaps the case which comes closest to supporting the conclusion of the California Supreme Court is Mullaney v. Wilbur, supra, 421 U.S. 684. In Mullaney this Court dealt with a Maine rule which required a defendant charged with murder, prove by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter. This Court held that such a

rule violated the requirement, under the due process clause of the Fourteenth Amendment, that the prosecution prove, beyond a reasonable doubt, every fact necessary to constitute the crime charged. In Mullaney the state argued that due process was satisfied once the state had demonstrated that any form of homicide had been committed. The state argued that due process required no more since once a finding of any homicide had been made the defendant's critical interest in liberty and reputation were no longer of paramount concern since irrespective of the presence or absence of the heat of passion or sudden provocation, he was likely to lose his liberty and certainly be stigmatized. This Court rejected the argument finding there were significant differences in the degrees of a criminal offense and

thus, due process applied to every element necessary to convict a defendant of the degree of crime found by the jury.

Still, however, this Court in Mullaney was dealing with the elements of a criminal offense. As determined by the California Supreme Court the elements necessary for the finding of a special circumstance are not the elements of a crime. Before a determination is necessary concerning special circumstances the jury must already have determined that all of the elements were present for conviction of first degree murder.

Special circumstances stand in an ancillary category, albeit, an important one. The issue of criminality has already been determined and what remains is a sentencing process, part of which

is the determination of the sentencing category applicable to a given criminal offense. Therefore, a special circumstance finding is more akin to a sentencing process than it is to a criminal determination.

Further, it must be noted the cases of this Court cited in the California Supreme Court's opinion dealt not with the omission of an instruction on an element but rather with instructions that required that the presence of certain elements be presumed. Such a presumption instruction is far more egregious and was properly treated as federal constitutional error.

What must be recognized is that California's death penalty procedure essentially defines a two-tiered system. The first tier is the classic determination of whether a crime was

committed. The second tier is whether the charged special circumstance has been proved. This, as noted above, has not been found by the California Supreme Court to involve the determination of whether an offense has occurred. Since it is not, it does not appear that the failure to instruct on the intent element of such a special circumstance is a matter affecting federal due process.

Under such circumstances the California Supreme Court concluded erroneously that the failure to instruct concerning the element of special circumstance was a federal constitutional error.

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II

ASSUMING THE FAILURE TO INSTRUCT ON THE ELEMENTS OF THE SPECIAL CIRCUMSTANCE IS A FEDERAL CONSTITUTIONAL ERROR IT SHOULD BE REVIEWED UNDER THE HARMLESS ERROR TEST DEFINED IN CHAPMAN V. CALIFORNIA

In its opinion below, the California Supreme Court found the failure to instruct the jury concerning an element of a charged special circumstance a violation of the due process clause of the Fourteenth Amendment to the United States Constitution. The court concluded such error was essentially prejudicial per se. (A number of narrow situations were defined that would allow a judgment to be affirmed even though the instructional error had occurred. None of these exceptions are applicable to the present case.) In so holding the California Supreme Court erred.

Assuming the failure to instruct on an element of special circumstance is a federal due process violation, the error should be reviewed under the harmless error test defined in Chapman v. California (1967) 386 U.S. 18.

In Chapman this Court concluded there were two classes of constitutional errors. Those that are so basic to a fair trial that their infraction can never be treated as harmless, and those, less fundamental, that may be considered harmless if the beneficiary of the error proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

While it is true that in Connecticut v. Johnson, a plurality of this Court held that an instruction that "every person is conclusively presumed

to intend the natural and necessary consequences of his act" was the functional equivalent of a directed verdict and that such an error was so basic that it could not be treated as harmless; and while cases have held that an erroneous instruction on the elements of an offense require reversal per se, (see Brotherhood of Carpenters v. U.S. (1947) 330 U.S. 395, cited in Connecticut v. Johnson, supra, 103 S.Ct. 969), there are fundamental differences between those situations and that in the present case which make the application of a different harmless error rule reasonable.

In the present case we are not dealing with the elements of an offense. Even if it is concluded the failure to instruct on the elements of a special circumstance is a federal due process

violation, the fact remains the special circumstance is not a criminal charge and there is no reason to require per se reversal when there is a failure to instruct on an element of that charged special circumstance.

The California capital punishment system can be seen as having two tiers. The first is the determination that the defendant has committed first degree murder. The second, described in argument I, supra, as being essentially a sentencing consideration, is the determination of whether the defendant's crime comes within a category which makes the defendant liable for the punishment of death or life imprisonment without the possibility of parole.

The first tier involves the classic determination of whether a criminal offense has occurred. As to

this determination the reasoning of the plurality in Connecticut v. Johnson may be applicable and failure to instruct on the elements of a criminal offense may require per se reversal. However, the special circumstance, as noted by the California Supreme Court is sui generis, and has some of the characteristics of a criminal determination and some of the characteristics of a sentencing determination. This being the case the determination of the special circumstance would seem less fundamental and would allow for a harmless error test under the Chapman standard. It would seem reasonable that even though an omission has occurred, concerning instruction on an element of the special circumstance, that if the People can demonstrate beyond a reasonable doubt the error complained of could not have

contributed to the verdict obtained, then the error should be found harmless and the judgment affirmed. (See Chapman v. California, supra, 386 U.S. at p. 24.)

Unless such a rule allowing a harmless error determination exists, unreasonable results occur. Recently, the California Supreme Court decided the case of People v. Ramos (Nov. 1, 1984, Crim. 21352) ___ Cal.3d ____. In Ramos the defendant entered a fast-food establishment to commit a robbery. Ramos placed two individuals in a walk-in refrigerator at the rear of the establishment. Ramos left and re-entered the walk-in refrigerator several times asking about the keys to the restaurant safe and telling the individuals to remain quiet. He eventually ordered the two individuals in the walk-in refrigerator to kneel on the floor, remove their hats

and say their prayers. He then shot both victims, killing one and wounding the other.

Based on the Carlos and Garcia decisions discussed in this petition, the California Supreme Court determined that it was an error of federal constitutional dimension to fail to instruct the jury that an element of the charged special circumstance was the intent to kill. Even in the face of the overwhelming evidence of an intent to kill the California Supreme Court noted that such error could not be reviewed under the Chapman test.

Since the special circumstances determination is less fundamental than the determination of the underlying criminal offense, it is reasonable to treat any error and instructions concerning the elements

of a special circumstances under the harmless error test of Chapman.

* * * * *

CONCLUSION

For the foregoing reasons petitioner respectfully submits the Writ of Certiorari should be issued to review the decision of the Supreme Court of the State of California.

Respectfully submitted,

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11/28/84

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LAWRENCE R. GARCIA, Defendant and Appellant.	CRIM. 22799 Super. Ct. No. CR 14923 FILED AUG. 6, 1984

Carlos v. Superior Court (1983) 35 Cal.3d 131, held that proof of intent to kill or to aid a killing was essential to a finding of a felony-murder special circumstance under the 1978 death penalty initiative. (Pen. Code, § 190.2, subd. (a)(17).) We granted a hearing in the present case to decide whether to give retroactive effect to our Carlos decision and to determine the test of prejudice applicable when a trial court fails to instruct a jury in accord with that decision.

We have concluded that because the Carlos opinion does not overturn prior law, but stands as the first authoritative construction by this court of the felony-murder provision of the 1978 initiative, it should apply to all cases not yet final arising under that enactment. Selecting a test of prejudice, however, presented us with a closer and more difficult question. We are persuaded, however, that under controlling decisions of the United States Supreme Court the failure to instruct upon intent as an element of a special circumstance, because it takes the issue of intent from the trier of fact, denies the defendant due process of law in violation of the Fourteenth Amendment. We further conclude that absent exceptional considerations not found in the present case the United States Supreme

Court would hold such constitutional error was necessarily prejudicial. Therefore, while affirming defendant's conviction, we reverse the finding of a special circumstance under section 190.2.

I. Summary of Facts and Proceedings.

On August 10, 1979, defendant drove Orlando Sandoval, his nephew, to a shopping center in Oxnard. Defendant stopped in front of a liquor store to let Sandoval out, then parked the car in a nearby alley. Sandoval entered the store and shot Al Wieczorek, a clerk. Wieczorek died of a bullet wound to the chest caused by a dum-dum bullet.[1/] Sandoval fled the store, apparently

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1. A dum-dum or wad cutter bullet is a scored or soft-nosed bullet which expands on impact. Such bullets are more lethal than ordinary bullets.

without taking anything, got in the car, and defendant drove away.

A few days later defendant was arrested while sitting in his car. The police found the gun used to kill Wieczorek under the pillow where defendant had been sitting. Defendant waived his right to remain silent and to counsel and agreed to talk to the police, but denied involvement in the crime. After the police talked to Sandoval, however, defendant admitted that he drove Sandoval to rob the liquor store, and that he knew Sandoval had a gun with dum-dum bullets. Sandoval told him that he panicked when he entered the store, and shot the clerk.[2/]

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2. Sandoval was convicted of murder with special circumstances and sentenced to life imprisonment without possibility of parole. Because Sandoval was not yet 18 at the time of the offense, we granted his petition for

Defendant was charged with attempted robbery and murder, with the special circumstance of felony murder. The prosecution did not seek the death penalty.[3]

At trial the prosecution introduced defendant's confession and other evidence proving defendant acted as the get-away driver for Sandoval's robbery. It also presented testimony by James Odra Smith, who was confined in jail awaiting retrial on a murder

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Footnote 2 continued:

hearing and retransferred his appeal to the Court of Appeal for reconsideration in light of People v. Spears (1983) 33 Cal.3d 297, which held that a person under 18 is ineligible for special circumstance proceedings.

3. We omit discussion of the various proceedings relating to the appointment of counsel and defendant's competency to assist counsel, since defendant raised no issue concerning those matters on appeal.

charge. Smith testified that defendant admitted to him that he furnished the gun and bullets to Sandoval. The defense, seeking to impeach Smith, presented evidence that Smith had been a police informant in numerous cases and received substantial benefits in return for his activity, including a reduction in bail on Smith's murder charge from $250,000 to $25,000. Smith also knew that defendant might be a witness for the prosecution in Smith's murder case. The defense also presented psychiatric testimony, not to show insanity or diminished capacity, but to explain that defendant would be prone to confess falsely if he thought the confession would help a relative such as Sandoval.

The jury was instructed that it should find defendant guilty of first degree murder if it found that he had

the specific intent to commit robbery and that the killing occurred in an attempt to perpetrate the crime of robbery. With regard to the special circumstance, the jurors were told only that the prosecution must prove beyond a reasonable doubt that the murder was committed while the defendant was an accomplice in the attempted commission of a robbery. They were not instructed that felony-murder special circumstances required an intent to kill or to aid in a killing. The jury returned a verdict finding defendant guilty as charged of attempted robbery and first degree murder, with the special circumstance of felony murder. The court, after denying a motion for new trial, sentenced defendant to life imprisonment without possibility of parole.

II. Issues relating to guilt.

Defendant argues that his confession was induced by an implied promise of leniency, and should have been excluded. (See People v. Jiminez (1978) 21 Cal.3d 595, 611-614.) The record shows only that one detective told defendant: "If you guys were doing a robbery, he shot the guy, he panicked or whatever, that's the price he's going to have to pay. We're going to focus our thing on him -- Orlando. But there's no sense you going down the way he is, that, that far down with him, as a trigger man . . . ."

This statement does not constitute an offer of leniency on the part of the police or the prosecution in return for a confession; it advised defendant that an accomplice is generally better off than a triggerman.

That was sound advice; even if we do not take Carlos into account, an accomplice is far less likely to receive the death penalty than the triggerman. (See Enmund v. Florida (1982) 458 U.S. 782, 794-795.)

In People v. Hill (1967) 66 Cal.2d 536, 549, we observed that "[t]he line to be drawn between permissible police conduct and conduct deemed to induce or to tend to induce an involuntary statement does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth, as represented by the police. . . . When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police

activity." We agree with the trial court that under the reasoning of Hill defendant did not receive an improper inducement to confess.[4/]

Defendant also contends that James Odra Smith was a police agent when he talked to defendant, and that Smith's testimony reporting their conversations should be excluded. Defense counsel, however, did not object to Smith's testimony at trial. Moreover, in view of defendant's confession, which

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4. Defendant had been a police informer for over 10 years, mostly in narcotics cases. In return for his assistance, the police had from time to time interceded with the district attorney to help defendant receive favorable treatment when he was arrested on narcotic possession charges. Defendant may have hoped that by cooperating in the present case he would also obtain leniency. The officers informed him, however, that the case involved a robbery-murder, a much more serious matter than defendant's past offenses. They did not promise to speak to the district attorney on his behalf.

established his guilt of attempted robbery and first degree murder, Smith's testimony concerning defendant's guilt of those crimes was harmless by any applicable test of prejudice.

III. Issues relating to the special circumstance finding.

In Carlos v. Superior Court, supra, 35 Cal.3d 131,we held that proof of intent to kill or to aid a killing is essential to a finding of felony-murder special circumstances under the 1978 death penalty initiative. Our decision necessarily implied that an instruction on intent to kill is required when the special circumstance issue is tried to a jury. No such instruction was given in the present case.

The effect of the Carlos decision upon the present case and other pending cases depends on whether that

decision is given retroactive effect, and upon the standard of harmless error applied when the required intent instruction is not given. We deferred resolution of those issues in Carlos, believing the issues were of sufficient difficulty and importance as to call for briefing and argument in a separate case.[5/]

A. Retroactivity.

In Donaldson v. Superior Court (1983) 35 Cal.3d 24, 37 we explained

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5. Carlos stated: "We do not decide whether this decision will apply retroactively to cases already tried, nor do we determine what test of prejudice controls in a case in which the court erroneously failed to instruct on the necessity for intent to kill in a felony murder special circumstances under the 1978 initiative. Such questions of retroactivity and prejudice, being unnecessary to the decision of the present case, have not been briefed or argued by the parties; we therefore defer resolution of those questions to a later case." (35 Cal.3d at p. 154, fn. 21.)

that "In determining whether a decision should be given retroactive effect, the California courts undertake first a threshold inquiry, inquiring whether the decision established new standards or a new rule of law. If it does not establish a new rule or standards, but only elucidates and enforces prior law, no question of retroactivity arises. [Citations.] Neither is there any issue of retroactivity when we resolve a conflict between lower court decisions, or address an issue not previously presented to the courts. In all such cases the ordinary assumption of retrospective operation [citations] takes full effect."

Following this initial inquiry, California courts employ a tripartite test derived from Stovall v. Denno (1967) 388 U.S. 293 to determine

the retroactive effect of a decision.[6/]

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6. The tripartite test generally applies only if the decision represented a break from past practice and authority (see Donaldson v. Superior Court, supra, 35 Cal. 3d 24, 38) but has occasionally been applied when the decision resolved a conflict in authority. One example is People v. Yates (1983) 34 Cal.3d 644, in which we held that a defendant charged with first degree murder receives 26, not 10, peremptory challenges. We applied our decision prospectively (except for Yates himself and the appellant in a companion case), directing that "whether the trial court anticipated our decision and granted each side 26 challenges, or whether it limited each side to 10 challenges, the present decision should not be employed to overturn the verdict and judgment in those trials or retrials commenced before this decision becomes final." (P. 654.) Yates involved a unique situation in which the court had to determine the appropriate number of peremptory challenges but recognized that, whatever the determination, the defendant was not denied a fair trial so long as he received as many challenges as the prosecution. Retrial of all cases in which the parties had received only 10 challenges would have imposed a substantial burden on the courts; yet there was no way to discover whether the additional 16 challenges would benefit the defendant more than the prosecution, or reason to believe the additional challenges would have any effect on the outcome of

Under this test, the court considers three factors: "(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of retroactive application of the new standards." (Stovall v. Denno, supra, 388 U.S. 293, 297; People v. Kaanehe (1977) 19 Cal.3d 1, 10.) The three factors, however, are not of equal weight: "the factors of reliance and burden on the administration of justice are of significant relevance only when the question of retroactivity is a close one after the purpose of the new rule is

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Footnote 6 continued:

a case. The magnitude of the judicial burden, coupled with the absence of the slightest basis for assuming prejudice, led us to limit the retroactive effect of our decision.

considered." (In re Johnson (1970) 3 Cal.3d 404, 410.) Under the tripartite test, when the purpose of a new rule is to deter future misconduct, or to define procedural rights collateral to a fair determination of guilt or innocence, the rule generally does not receive retroactive effect. (Donaldson v. Superior Court, supra, 35 Cal.3d 24, 38, 39.) On the other hand, when a decision goes to the integrity of the fact finding process (People v. Kaanehe, supra, 19 Cal.3d 1, 10), or "implicate[s] questions of guilt or innocence" (Pryor v. Municipal Court (1979) 25 Cal.3d 238, 258), retroactivity is the norm.

In the present case both the threshold inquiry and the tripartite test lead to the conclusion that the Carlos decision should be given retroactive effect. That decision addressed

a question of first impression in this court. Decisions of the Courts of Appeal, reaching differing conclusions, were vacated by the grant of a hearing here. Thus there was never a final, authoritative opinion of a California appellate court holding that a defendant could be subject to a felony-murder special circumstance even though he lacked any intent to kill. Carlos therefore did not constitute a clear break from the past -- the overthrow of an established rule and the establishment of a new rule. Instead, it falls within the category of decisions generally given retrospective application.

Moreover, under the tripartite test, the purpose of a judicial decision is the most significant factor in determining its retroactive effect. The purpose of Carlos was to carry out the

intent of the 1978 act of avoiding imposition of the death penalty or life imprisonment without possibility of parole upon persons who did not intend to kill. Whenever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim. (See People v. Mutch (1971) 4 Cal.3d 389, 395-396.) If in addition, as in the present case, the decision represents the first authoritative construction of the enactment, no history of extended and justified reliance upon a contrary interpretation will arise to argue against retroactivity. Under these circumstances, the burden on the courts incurred in the retrial of the special circumstance issue is insufficient to tip the balance

against retroactivity. The Carlos holding should apply retroactively to all cases not yet final.

B. Prejudicial error.

We requested the parties to brief the various state and federal tests of prejudicial error. After review of the briefs and arguments presented, we have concluded that this case is controlled by a line of United States Supreme Court decisions beginning with In re Winship (1970) 397 U.S. 358 and continuing through Sandstrom v. Montana (1979) 442 U.S. 510 and Connecticut v. Johnson (1983) ___ U.S. ___ [103 S.Ct. 969]. Although these decisions involve the constitutionality of state practices relating to presumptions and burdens of proof, they contain language and reasoning which indicate that instructions or omissions which deny a

defendant his right to have the jury decide each element of a charged offense are necessarily reversible error.

In re Winship, supra, 397 U.S. 358 held that when a juvenile was charged with a criminal offense, the state must prove guilt beyond a reasonable doubt. (397 U.S. at p. 364.) Mullaney v. Wilbur (1975) 421 U.S. 684, then held unconstitutional a Maine statute which classified all intentional homicide as murder unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation. The potentially broad scope of that holding, however, was soon restricted when in Patterson v. New York (1977) 432 U.S. 197 the court held that a statute placing the burden of proving extreme emotional disturbance on the defendant did not deny due process.

Proof of extreme emotional disturbance, the court reasoned, was not necessary to prove commission of the crime (see 432 U.S. at p. 206) but a separate issue (p. 207).

Sandstrom v. Montana, supra, 442 U.S. 510, is the key decision in this line of authority. Sandstrom was a murder prosecution with a diminished capacity defense in which the court instructed the jury that "[T]he law presumed that a person intends the ordinary consequences of his voluntary acts." (P. 517.) Sandstrom quotes Winship to the effect that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (P. 520, quoting 397 U.S. 358, 364.) The constitutional defect in the

jury instruction, it says, was that "Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent. The State was thus not forced to prove 'beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged'" (P. 523.) Even if the presumption did not direct a verdict, but only shifted the burden of proof, it would still violate the requirement that "'a State must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant.'" (P. 524, quoting Patterson v. New York, supra, 432 U.S. 197, 215.)[7/]

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7. The parties cite other federal cases of lesser moment. The public defender points to Presnell v. Georgia (1978) 439 U.S. 14, which held that it

The United States Supreme Court decisions make it clear that when intent is an element of a crime, an instruction directing the jury to find

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Footnote 7 continued:

is a denial of due process to convict a defendant upon an offense not charged. (Accord, In re Hess (1955) 45 Cal.2d 171, 174-175.) The Attorney General cites Hopper v. Evans (1982) 456 U.S. 605, which found no denial of due process in a trial court's failure to instruct on a lesser offense of unintentional homicide when the defendant admitted an intentional killing. Both are distinguishable from the present setting, which involves instructions on the special circumstance charged, not an uncharged or lesser crime.

A number of California cases (e.g., People v. Mayberry (1975) 15 Cal.3d 143, 157-158; People v. Sedeno (1974) 10 Cal.3d 703, 720; People v. Modesto (1963) 59 Cal.2d 722, 730) hold that failure to instruct on the elements of a crime, a lesser included offense, or an affirmative defense constitute a denial of the constitutional right to jury trial. None of the cases distinguish between the federal and the state constitutional right to jury trial, and none rely on federal authority to frame a test of prejudice.

or conclusively presume intent denies due process, regardless of the weight of the evidence. An instruction putting the burden of proof on the defendant is equally infirm. The reasoning of the opinions, however, goes beyond inquiry into presumptions, burdens of proof, and other procedural analogs to a directed verdict. That reasoning would invalidate any instruction or failure to instruct which would permit the state to circumvent the requirement that it prove every fact necessary for conviction beyond a reasonable doubt. (See In re Winship, supra, 397 U.S. 358, 364.) Thus a failure to instruct on the element of intent, because it would permit the jury to find guilt without proof of intent beyond a reasonable doubt, would constitute a denial of due process.

The jury in the present case was instructed that to find a special circumstance of felony murder, "it must be proved that the murder was committed while the defenant [sic] was an accomplice in the attempted commission of a robbery." That instruction necessarily implied that the jury could find the special circumstance true even if defendant did not intend to kill or to aid in a killing, but intended only to participate in an attempted robbery. It removed the issue of intent from the jury as effectively as if the jury had been told expressly that intent was not an issue, or was conclusively presumed against defendant. Under the reasoning of Sandstrom, defendant was denied due process of law under the Fourteenth Amendment.

Seeking to distinguish Sandstrom, the Attorney General argues that a special circumstance is not a "crime," and an element of a special circumstance thus is not an "element of a crime." His argument is technically sound; special circumstances are sui generis -- neither a crime, an enhancement, nor a sentencing factor. We have, however, noted the resemblance between a special circumstance proceeding and a trial to determine guilt. In People v. Superior Court (Engert) (1982) 31 Cal.3d 797, 803, we said: "In the California scheme the special circumstance is not just an aggravating factor: it is a fact or set of facts, found beyond reasonable doubt by a unanimous verdict (Pen. Code, § 190.4), which changes the crime from one punishable by imprisonment of 25 years to life to one which

must be punished either by death or life imprisonment without possibility of parole. The fact or set of facts to be found in regard to the special circumstance is not less crucial to the potential for deprivation of liberty on the part of the accused than are the elements of the underlying crime which, when found by a jury, define the crime rather than a lesser included offense or component." (Fn. omitted.) Engert therefore held that the standards of specificity applicable to statutes defining criminal offenses applied equally to special circumstances. On similar grounds Ghent v. Superior Court (1979) 90 Cal.App.3d 944 rejected the claim that special circumstances are analogous to enhancements and held that, like criminal charges, a special circumstance allegation could be challenged

under section 995. We endorsed that holding in Ramos v. Superior Court (1982) 32 Cal.3d 26, 32-33.

As we noted in Carlos v. Superior Court, supra, 35 Cal.3d 131, 134, "[a] finding of murder with special circumstances requires the trier of fact to choose between only two alternatives -- death or life imprisonment without possibility of parole -- the most severe punishments permitted under our law." It is, moreover, an essential prerequisite to the imposition of the unique and extreme sanction of death. In view of the importance of a special circumstance finding, we do not believe the courts can extend a defendant less protection with regard to the elements of a special circumstance than for the elements of a criminal charge. If failure to instruct on the element of a crime is

a denial of federal due process, the same consequence should attend failure to instruct on the element of a special circumstance.

The test of prejudice for Sandstrom error is yet to be formulated. When the issue reached the United States Supreme Court in Connecticut v. Johnson, supra, ___ U.S. ___ [103 S.Ct. 969], that court divided evenly. Justice Blackmun, joined by Justices Brennan, Marshall, and White, took the position that Sandstrom error would be harmless only in rare cases, such as one in which the defendant conceded the issue of intent; in all other cases, the conviction must be reversed regardless of the weight of the evidence. Justice Powell, joined by the Chief Justice, Justice Rehnquist and Justice O'Connor, argued in favor of the Chapman standard, under

which federal constitutional error does not require reversal if "harmless beyond a reasonable doubt." (Chapman v. California (1967) 386 U.S. 18, 24.) Justice Stevens, the tie-breaking vote, did not address the test of prejudice required by the federal Constitution; he maintained that Connecticut's application of a test requiring per se reversal violated no federal rights even if it went beyond federal constitutional requirements. Justice Stevens thus voted with the majority to affirm the Connecticut court's reversal of defendant's conviction for attempted murder.[8/]

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8. Since Connecticut v. Johnson did not decide the standard of prejudice, the lower federal circuits have continued to follow their prior cases, most of which employed the Chapman standard. (See Brooks v. Francis (11th Cir. 1983) 716 F.2d 780, 794; Engle v. Koehler (6th Cir. 1983) 707 F.2d 241, 246; Healy v. Maggio (5th Cir. 1983) 706 F.2d 698, 701.)

The trial court in Connecticut v. Johnson had instructed the jury that "every person is conclusively presumed to intend the natural and necessary consequences of his act." (P. ___ [103 S.Ct. at p. 973].) The plurality opinion by Justice Blackmun reasoned that this instruction was the equivalent of a directed verdict on the issue of intent, and that since a directed verdict is impermissible regardless of the weight of the evidence, the conviction must be reversed despite overwhelming evidence of guilt. "An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied on the presumption rather than upon that evidence. If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not

contribute to the verdict." (P. ___, fn. omitted [103 S.Ct. at p. 977].)

The dissent agreed that an instruction which "removes an issue completely from the jury's consideration" (p. ___ [103 S.Ct. at p. 982]) would require automatic reversal, but maintained that the instruction given by the Connecticut judge did not go that far. Unlike a directed verdict, argued the dissent, the Connecticut presumption did not take the issue wholly from the jury. That presumption established only that the defendant intended the natural and necessary consequences of his acts, leaving it to the jury to determine the nature of those consequences.

The dissent, as we read it, draws a fine distinction. It concedes that an instruction which operated independently from the evidence, directing

or permitting the jury to find intent without examining that evidence, would be reversible per se. On the other hand, it asserts, a presumption which takes effect only if the jury finds certain preliminary facts does not permit the jury to avoid examining the evidence and should therefore be subject to a less stringent standard of prejudice. As Justice Powell explained, "The jury must look to the evidence initially to see if the basic facts have been proved before it can consider whether it is appropriate to apply the presumption. . . . If . . . those basic facts are themselves dispositive of intent, the presumption becomes unnecessary to the jury's task of finding intent. Because the presumption does not remove the issue of intent from a jury's consideration, it does not preclude a reviewing

court from determining whether the error was 'harmless beyond a reasonable doubt.'" (P. ___ [103 S.Ct. at pp. 982-983].)

The dissent's distinction leads us to conclude that at least eight justices of the United States Supreme Court (all except Justice Stevens, who took no position on the issue) agree that a jury instruction which does take an issue completely from the jury is reversible per se. We have no doubt that they would reach the same conclusion if the error was one of omission -- failing to submit the issue of intent to the jury. Both forms of error have the same effect: removing the issue wholly from jury determination, and thus denying defendant the right to jury trial on the element of the charge.

It is clear that the instructional error in the present case completely eliminated the issue of intent to kill from the consideration of the jury. Unlike the presumption at issue in Sandstrom and Connecticut v. Johnson, the instructions here did not require the jury to examine evidence which bore on intent and which might make use of a presumption unnecessary. Instead, the jury was told simply if it found that the murder was committed while defendant was an accomplice to an attempted robbery, it should find the special circumstance true. The only intent relevant to such a finding was defendant's intent to aid in a robbery, and that was already established by defendant's confession. We conclude that the United States Supreme Court would find the

error in the present case reversible per se.[9]

The plurality opinion in Connecticut v. Johnson described two exceptions to its rule of per se reversal: "if the erroneous instruction was given in connection with an offense for which the defendant was acquitted and if the instruction had no bearing on the offense for which he was convicted," and "if the defendant conceded the issue of intent." (P. ___ [103

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9. The recent decision in People v. Beeman (1984) 35 Cal.3d 547 invalidated a form jury instruction which erroneously permitted a person to be convicted as an accomplice without proof that he intended to aid in the commission of the offense. We observed that although the error arising from the failure to require intent "is not identical to a conclusive presumption or to placing the burden of persuasion on the defendant [citing Connecticut v. Johnson], it is just as effective -- if not more effective -- in removing the issue of intent from the jury's consideration." (P. 562, fn. 4.)

S.Ct. at pp. 977-978].) California experience with a similar test of prejudicial error established in People v. Modesto, supra, 59 Cal.2d 722,[10/] indicates that additional exceptions may be appropriate. In People v. Sedeno, supra,10 Cal.3d 703, 721, we explained that "in some circumstances it is possible to determine that although an instruction . . . was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should

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10. To avoid possible misunderstanding, we reiterate that we decide the present case on the basis of federal precedent. We take no position on whether, in the absence of controlling federal authority, we would apply the California prejudicial per se test of Modesto or some other, less stringent, test.

not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant . . . ."[11] We believe that, in an appropriate case, the United States Supreme Court would accept this exception to the automatic reversal standard.

Two later decisions, People v. Cantrell (1973) 8 Cal.3d 672, 685 and People v. Thornton (1974) 11 Cal.3d 738

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11. This exception is important in special circumstance cases under the 1978 death penalty initiative. While the felony-murder special circumstance (Pen. Code, § 190.2, subd. (a)(17) was silent on intent to kill, some other special circumstances expressly require an intentional killing. (See, e.g., Pen. Code, § 190.2 subd. (a)(15), which describes as a special circumstance that "[t]he defendant intentionally killed the victim while lying in wait.") If a correctly instructed jury found intent to kill under some other special circumstance, the failure to instruct on intent to kill under the felony-murder special circumstance might not be reversible error.

relaxed the rigidity of the Modesto rule. Cantrell was a murder case in which the defendant had confessed to killing a juvenile who had objected to defendant's sexual advances. The defense was diminished capacity, and the trial court instructed on manslaughter as a lesser offense only as it might be the result of diminished capacity. Defendant objected to the failure to instruct generally on voluntary and involuntary manslaughter. The court rejected that contention, stating that "[t]he rule requiring the court to instruct the jury upon every material question upon which there is any evidence whatsoever deserving of consideration [citing Modesto] does not imply instructions should be given on issues and questions not raised by the evidence." (8 Cal.3d at p. 685.)

People v. Thornton involved the retroactive application of People v. Daniels (1969) 71 Cal.2d 1119, which held that substantial asportation which increased the risk of harm to the victim was an element of Penal Code section 209 kidnaping. Thornton was convicted of kidnaping (and many other crimes) before Daniels. The majority, by Justice Sullivan, affirmed the kidnaping conviction on the ground that, on the appellate record, it was clear that the asportation met the Daniels standard. Justice Mosk dissented, arguing that the Modesto rule should apply to instructional error relating to an essential element of the offense. (11 Cal.3d, pp. 771-772.)

The majority responded to the Mosk dissent in a lengthy footnote. (Fn. 20, pp. 768-769.) They stated that

"Modesto and Sedeno indeed hold that 'a defendant has a constitutional right to have the jury determine every material issue presented by the evidence' . . . and that the failure to instruct on such an issue is prejudicial per se. Such a 'material issue' is 'presented by the evidence' within the meaning of those cases when the record contains 'any evidence deserving of any consideration whatsoever' relative to it. . . . In the instant case we hold as a matter of law that defendant's acts constituted section 209 kidnaping under Daniels . . . and that there is no evidence worthy of consideration to the contrary."

In many cases it will be difficult to apply the Cantrell-Thornton analysis to Carlos error. If the defendant in a pre-Carlos trial was unaware that intent to kill was an element of

the felony-murder special circumstance, he might through ignorance fail to present evidence worthy of consideration on that matter. We could not in such cases affirm a special circumstance finding on the ground that defendant did not introduce evidence sufficient to raise a material issue. But there may also be cases where the parties recognized that intent to kill was in issue, presented all evidence at their command on that issue, and in which the record not only establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration.[12]

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12. We note, for example, that the issue of intent may arise in connection with a prosecution attempt to prove first degree murder without reliance on the felony-murder rule, in connection with some special circumstance which expressly requires intent to kill, or at the penalty phase where lack of intent would be a mitigating factor.

In such a case the reasoning of Cantrell and Thornton may avoid a meaningless retrial.

We are uncertain whether the United States Supreme Court will endorse the Cantrell-Thornton exception to its apparent rule favoring automatic reversal. The four dissenting justices in Connecticut v. Johnson, supra, ___ U.S. ___ [103 S.Ct. 969], accused the plurality of requiring "reversals of convictions in many situations in which the defendant's actions establish intent as conclusively as if it were unequivocally conceded." (P. ___ [103 S.Ct. at p. 984].) The plurality did not respond to this charge. The making of the accusation suggests that four justices of the court would be sympathetic to a limited exception that would avoid retrial in some cases in which the evidence

unequivocally and conclusively established intent, but leaves it uncertain whether a majority would take that position. Accordingly, pending further guidance from the United States Supreme Court, we will apply the reasoning of Cantrell and Thornton only to those cases clearly falling within the ambit of that reasoning so as not to detract substantially from the per se character of the high court's rule.

In any event, the present case does not fall within any of the exceptions to automatic reversal. The omitted instruction on intent related to the special circumstance found to be true, not to some crime or special circumstance of which defendant was acquitted. Defendant did not concede intent. The jury did not find that he intended to kill in connection with some

other, proper instruction. And the evidence does not come close to establishing intent to kill as a matter of law.

Defendant did not shoot the victim and was not present in the store at the time of the shooting. The fact that he agreed to aid a robbery, knowing his companion was armed, is insufficient to demonstrate that defendant himself intended to aid a killing. (Carlos v. Superior Court, supra, 35 Cal.3d 131, 151; see Enmund v. Florida (1982) 458 U.S. 782.) The testimony of Smith that defendant supplied dum-dum bullets to Sandoval raises the possibility that defendant intended Sandoval would shoot to kill during the robbery. But this testimony is equivocal, raising at best a possible inference of intent to aid a killing, and it comes from a witness

whose credibility is in serious doubt. Whatever the scope of the Cantrell-Thornton exception to automatic reversal, it is clear that the case at hand does not fall within that exception. The finding of the felony-murder special circumstance must therefore be reversed.

Defendant argues that we should not only reverse the special circumstances finding, but should bar retrial on that allegation. He points out that in Carlos, on very similar facts, we held the evidence was insufficient to constitute probable cause to try Carlos on the special circumstance allegations. Recognizing that in many cases tried before Carlos insufficiency of the evidence to show intent to kill might be the result of the prosecution's failure to realize that proof of intent was essential, he argues that his case

is different because he was charged with premeditated murder as well as felony murder. Consequently, he argues, in his case the prosecution must be deemed to have introduced all the evidence it had to show intent and premeditation, and since that evidence would be insufficient to support a finding of intent to kill, retrial of that issue is unnecessary.

We agree with the defendant that the evidence presented may be insufficient to support a finding of intent to kill, but think it unrealistic to assume that the prosecution, with a perfect case for proof of felony murder, necessarily presented all available evidence relating to intent. We therefore reverse the special circumstance

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finding without directions, permitting the prosecution to seek retrial of that issue.[13]

The judgment convicting defendant of murder and attempted robbery is

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13. Defendant may be able to argue that if the evidence at the first trial was insufficient to support a finding of intent to kill, retrial of that issue violates constitutional protections against double jeopardy. (See Burks v. United States (1978) 437 U.S. 1; In re Johnny G. (1978) 25 Cal.3d 543, 548-549.) He does not make that argument here, but our opinion would not bar him from raising a plea of once in jeopardy should the prosecution attempt to retry the special circumstance of felony murder.

affirmed, the finding of a special circumstance under Penal Code section 190.2, subdivision (a)(17) is set aside, and the cause is remanded to the superior court for further proceedings.

BROUSSARD, J.

WE CONCUR:

Kaus, J.
Reynoso, J.
Grodin, J.
* Brown, (G.A.)

*Assigned by the Chairperson of the Judicial Council

CONCURRING AND DISSENTING OPINION BY BIRD, C.J.

I agree with the majority opinion, but I have one significant reservation. I cannot agree with the majority's decision to elevate the reasoning of Cantrell [1] and Thornton [2] to create a categorical exception to the "per se reversal" rule. The majority's newly created "Cantrell-Thornton exception" constitutes a clear invastion by the appellate courts of the exclusive province of the jury.

Justice Mosk, joined by the late Justice Tobriner, pointed out in his dissent in Thornton that the rule set forth in that case was wrong. As Justice Mosk so aptly expressed,

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1. People v. Cantrell (1973) 8 Cal.3d 672.

2. People v. Thornton (1974) 11 Cal.3d 738.

Thornton is the classic "hard case" which makes bad law. (Thornton, supra, 11 Cal.3d at p. 783 (dis. opn. of Mosk, J.).) By adopting Thornton here, the majority perpetuate that mistake and substitute this court's judgment for that of the jury.

Under our system of justice, juries alone have been entrusted with the responsibility of determining guilt or innocence. (Weiler v. United States (1945) 323 U.S. 606, 611.) An accused "has a constitutional right to have the jury determine every material issue presented by the evidence. Regardless of how overwhelming the evidence of guilt may be, the denial of such a fundamental right . . . is a miscarriage of justice . . . ." (People v. Modesto (1963) 59 Cal.2d 722, 730; see also People v. Sedeno (1974) 10 Cal.3d 703, 720.)

Even the majority recognize that the courts cannot "extend a defendant less protection with regard to the elements of a special circumstance than for the elements of a criminal charge." (Maj. opn., ante, at p. 17.) However, under the majority's Cantrell-Thornton exception, it is an appellate court that will determine whether the accused entertained the intent to kill required when a felony-murder special circumstance is charged.

The majority apply the Cantrell-Thornton exception to all cases "where the parties recognized that intent to kill was in issue, presented all evidence at their command on that issue, and in which the record not only establishes the necessary intent as a matter of law but shows the contrary

evidence not worthy of consideration." (Maj. opn., ante, at p. 25.)

The appellate court will have to divine whether (1) the litigants recognized that an intent to kill was in issue; (2) the parties presented all the evidence at their command; and (3) the evidence established the requisite intent. Giving an appellate court this role undermines the jury's power to determine whether an accused entertained the intent to kill that is a prerequisite to an finding of a felony-murder special circumstance.

The majority recognize that if a jury is not instructed that intent is an element of any felony-murder special circumstance, that issue is essentially removed from a jury's consideration. As a result, the accused is denied the right to a jury trial on an element of

the special circumstance allegation. (See maj. opn., ante, at p. 20-21.) The majority accept a "per se reversal" rule for Carlos [3] error, yet they carve out an exception to that rule as it pertains to the issue of intent in a felony-murder special circumstance allegation. Such a rule defies logic.

The Supreme Court, in Connecticut v. Johnson (1983) ____ U.S. ____ [103 S.Ct. 969], stated that "[i]f the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant. To allow a reviewing court to perform the jury's

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3. Carlos v. Superior Court (1983) 35 Cal.3d 131.

function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made." (Id., at p. 977, fn. omitted, emphasis added [hereafter Johnson].) Clearly, the Cantrell-Thornton exception would not pass muster under this precedent.4/

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4. The majority assert that the four dissenting justices in Johnson would be "sympathetic" (maj. opn., ante, at p. 26) to such an exception. However, the Johnson dissent explicitly distinguished the case it had before it from cases where the jury was prevented from considering the issue of intent. (Johnson, supra, ___ U.S. at pp. ___, and fn. 3 [S.Ct. at pp. 982-983] (dis. opn. of Powell, J.).) Moreover, the dissent indicated that if "an execution-style slaying occurred, in which the defendant tied up his victim and shot him repeatedly in the head, it would be clear beyond a reasonable doubt that the presence of a conclusive presumption instruction would not have affected

I cannot endorse a holding which substitutes the belief of appellate judges for a jury's finding as to the truth of a special circumstance allegation. (See Bollenbach v. United States (1946) 326 U.S. 607, 615.)

BIRD, C.J.

I CONCUR:

MOSK, J.

Footnote 4 continued:

a jury's finding of intent." (Id., at p. 984, emphasis added.) The dissent's statement was directed only to those cases where the jury had explicitly determined the issue of intent. Thus, it is doubtful that a majority of the Supreme Court would accept the Cantrell-Thornton exception which this court carves out today.

AFFIDAVIT OF SERVICE BY MAIL

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JOHN W. CARNEY
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101

No: _____
October Term, 1984

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

LAWRENCE RICHARD GARCIA,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within Petition for Writ of Certiorari as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Ed Schulman, Esq.
Office of the Public Defender
107 S. Broadway
Los Angeles, CA 90012

Office of the District Attorney
Ventura County Superior Court
800 S. Victoria Avenue
Ventura, CA 93009

Ventura County Superior Court
800 S. Victoria Avenue
Ventura, CA 93009

For Delivery to:
Hon. Lawrence Storch, Judge

California Court of Appeal
Second Appellate District,
Division Five
3580 Wilshire Blvd., Room 301
Los Angeles, CA 90010

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 7th day of December, 1984.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, December 7, 1984.

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 7th day of December, 1984.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1986